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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/678,206

10/03/2003

Keith Colacioppo

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EXAMINER

DOAN, ROBYN KIEU

ART UNIT

PAPER NUMBER

3732

MAIL DATE

DELIVERY MODE

11/20/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/678,206

Applicant(s)

COLACIOPPO ET AL.

Examiner

Robyn Doan

Art Unit

3732

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION:

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 September 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 4-16 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 4-16 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>11/07/07</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Applicant's Amendment filed 9/13/2007 has been entered and carefully considered. Claim 1 has been amended. Arguments regarding the 35 U.S.C. 103 (a) have not been found to be persuasive, therefore, claims 1, 4-16 are rejected under the same ground rejections as set forth in the office action mailed 6/13/2007.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 4-11 and 14, 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Holden (U.S. Pat. # 2,480,023).

With regard to claim 1, Holden discloses a hair treatment applicator (figs. 1-3) comprising a handle (10 via member 12) having a longitudinal axis and being in an elongated form; a plurality of retaining structures or heads (28) connected to the handle, each of the plurality of retaining structures having a base (at 26) and a plurality of tines (30) and is capable of holding hair treatment, wherein the base facing in a direction substantially parallel to that of each other retaining structures and each of said plurality of tines extends substantially perpendicular from the base (see fig. 1); a separation volume (space between the two retaining structures) separating each of the retaining

structures from each other. Holden fails to show the material of the handle being molded from one plastic material, however, it would have been obvious to one having an ordinary skill in the art at the time the invention was made to employ the material of the handle being molded from one plastic material, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416. In regard to claims 4 and 15, Holden shows the plurality of tines in each retaining structures or heads being disposed on the base such that each tine being comprised within a first row of two or more tines (see fig. 2), however, Holden fails to show the tines aligned in a direction substantially parallel to the longitudinal axis of the handle and within a second row of two or more tines aligned in a direction substantially perpendicular to the longitudinal axis of the handle. It would have been an obvious matter of design choice to construct the tines aligned in a direction substantially parallel to the longitudinal axis of the handle and within a second row of two or more tines aligned in a direction substantially perpendicular to the longitudinal axis of the handle, since it has been held that rearranging location of parts of an invention involves only routine skill in the art. In re Japikse, 86 USPQ 70. In regard to claims 5, 6 and 7, Holden shows the hair applicator being a single piece (see fig. 1) and fails to show the handle being integrally molded with each of the retaining structures and the hair treatment applicator being injection molded from a polyethylene material. It would have been obvious to one having an ordinary skill in the art at the time the invention was made to construct the handle being integrally molded with each of the retaining structures and

the hair treatment applicator being injection molded from a polyethylene material, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416. And also, since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. In regard to claim 8, Holden fails to show the shape of each of the plurality of tines being frusto-conical. It would have been obvious to one having an ordinary skill in the art at the time the invention was made to construct the shape of each of the plurality of tines being frusto-conical, since such a modification would have involved a mere change in the shape of the known component. A change in shape is generally recognized as being within the level or ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955). In regard to claims 9-11, Fitzgerald fails to show each of the tines having a proximal end having diameter from about .125 inches to about .3125 inches and a distal end having a diameter from about .0625 inches to about .375 inches, the height of each tine being from about .25 inches to 1 inches and the separation volume having a width of at least about .25 inches. It would have been obvious to one having an ordinary skill in the art at the time the invention was made to construct each of the tines having a proximal end having diameter from about .125 inches to about .3125 inches and a distal end having a diameter from about .0625 inches to about .375 inches, the height of each tine being from about .25 inches to 1 inches and the separation volume having a width of at least about .25 inches, since such a modification would have involved a mere change in the size of the known

component. A change in size is generally recognized as being within the level or ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955). In regard to claim 14, Holden shows the plurality of retaining structures being connected to the handle in an arrangement which is bilaterally symmetrical across the longitudinal axis of the handle (see fig. 1).

Claims 1 and 12, 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 00/69308.

With regard to claims 1 and 16, WO '308 discloses a hair treatment (translated abstract) and a hair treatment applicator (figs. 3 and 4) comprising a handle (1) having a longitudinal axis and being in an elongated form; a plurality of retaining structures or heads (at 5) connected to the handle, each of the plurality of retaining structures having a base (4) and a plurality of tines (5) and being configured for holding hair treatment, wherein the base facing in a direction substantially parallel to that of each other retaining structures and each of said plurality of tines extends substantially perpendicular from the base (see fig. 4); wherein each of the retaining structures being separated from each other by a separation volume (10) and wherein the hair treatment being contained in each of the plurality of retaining structures (Applicant is noted that the hair treatment being dispensed from the opening 13 and into the retaining structure) and is not contained in the separation volume. WO '308 fails to show the material of the handle being molded from one plastic material, however, it would have been obvious to one having an ordinary skill in the art at the time the invention was made to employ the

material of the handle being molded from one plastic material, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416. In regard to claim 12, WO '308 discloses each of the plurality of retaining structures having at least one baffle (10) extending from the base. In regard to claim 13, the baffle being substantially parallel to the longitudinal axis of the handle (see fig. 4).

Response to Arguments

Applicant has argued that the handle of Holden (10) is not present when the massage brush is used as a liquid applicator to dispense hair tonic. Applicant is noted that the claimed limitations met to both situations (bath spray or liquid applicator), if the brush is used as a liquid applicator, then the container is the handle of the device, however, if the brush is used as bath spray, the handle is shown in 10 as discussed above; the massage brush is capable of holding hair treatment and since the hair treatment has not being positively claimed in claims 1 and 15, therefore, the rejection is proper. Applicant has also argued that the nubs of the massage brush are not configured for holding hair treatment, this is not true, the nubs are capable for holding hair treatment (space between two nubs), the hair treatment is not positively claimed, therefore, Holden meets the claimed limitations. Applicant has further argued that base portion between two retaining structures of Holden is not a separation volume because it contains holes through which hair treatment spray is discharged from the attached

container (handle) of hair treatment. The base portion between the two retaining structures (28) are not completely covered with holes, therefore, the portion that does not contain holes is capable to allow a section of hair pass through without being treated.

Applicant has further argued that the guiding prong (10) of reference WO 00/69308 is not a separation volume, this is not correct because the guiding prong is capable of allowing a section of hair to pass through the hair treatment applicator without being treated. Applicant has also argued that WO '308 does not show a handle, as discussed above, WO '308 shows a handle (1, figs. 5-7).

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robyn Doan whose telephone number is (571) 272-4711. The examiner can normally be reached on Mon-Fri 8:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Cris Rodriguez can be reached on (571) 272-4964. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Robyn Doan/
Primary Examiner
Art Unit 3732

rkd
November 16, 2007